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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 362

ROLLO REEVES,

Petitioner,

v.

PACIFIC FAR EAST LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, ROLLO REEVES, plaintiff-respondent below, respectfully prays a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon in the above entitled case entered March 26, 1969 reversing and remanding for a new trial the action brought by petitioner, a merchant seaman, for damages for personal injuries sustained while serving aboard defendant's vessel.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 88 Adv. Sh. 103, — Or. —, 452 P.2d 313 (1969) and is appended at pages 7 to 10 (Appendix A).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered March 26, 1969. Petitioner's Petition for Rehearing in that Court was denied April 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Can the Supreme Court of the State of Oregon disregard and refuse to apply the clear rule of law set forth in *Sentilles* v. *Inter-Caribbean Shipping Corporation,* 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142 that legal determination of the question of causation of an injury in a Jones Act case is not to be made by physicians but by the jury.

STATUTE INVOLVED

46 U.S.C. 688:

"*Recovery for injury to or death of seaman.* Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law,

with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of pesonal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law within the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

STATEMENT OF THE CASE

Petitioner was injured during the month of September 1964 while serving as a merchant seaman aboard defendant's vessel. Petitioner filed an action in the Circuit Court of the State of Oregon for the County of Multnomah to recover damages caused by the negligence of defendant through the acts of its employees and agents and the unseaworthiness of the vessel.

The injuries claimed by the petitioner involved the ligaments, muscles, nerves and soft tissue of his left shoulder and neck and impairment of his hearing by reason of a blow to his left ear. No claim was made that the injury caused a sebaceous cyst (Record 2).

Petitioner testified that after the accident he developed a hearing problem for a while; that he had a ringing and ache in his left ear; that his left ear was uncomfortable all the time with lots of pressure on it, but that he didn't have any hearing problem at the time of trial (Tr. 37). A lump developed behind his ear a month or two after the accident which was later removed by minor surgery (Tr. 39, 40).

The doctor who testified at the trial had examined petitioner at the request of defendant's attorney. He concluded that the lump that developed behind petitioner's ear was a sebaceous cyst that occur spontaneously not due to trama. He further testified that the cyst could have been large enough to somewhat diminish petitioner's hearing however he did not feel that had anything to do with the accident (Tr. 13).

The Oregon Supreme Court held that the foregoing evidence on the claim of hearing impairment could only lead the jury to speculate as to causal connection between petitioner's hearing problem and the accident and reversed the lower court judgment and remanded for a new trial (Record 20).

Petitioner filed a timely petition for rehearing wherein petitioner directed the Oregon Supreme Court's attention to the decisions of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173, 4 L. ed 2d 142 (1959) and *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) wherein this Court has

made it clear that in a Jones Act case legal determination of the question of causation is not to be made by a physician but by the jury (Record 21).

Petitioner's Petition for Rehearing was denied by the Oregon Supreme Court (Record 23).

REASONS FOR GRANTING WRIT

The Oregon Supreme Court has refused to follow and apply the following clear rulings of this Court in *Sentilles* v. *Inter-Caribbean Shipping* and *Rogers* v. *Missouri Pacific R. Co., supra:*

(1) That in a Jones Act case the legal determination of the question of causation of a seaman's injury is not to be made by a physician but by the jury; and

(2) That courts are not free to re-weigh the evidence and set aside a jury verdict in favor of an injured seaman merely because the jury could have drawn different inferences or conclusions or because a judge might feel that other results are more reasonable.

CONCLUSION

The Supreme Court of the State of Oregon having applied an improper standard in reviewing the medical evidence and in examining the judgment rendered on the jury verdict, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Respectfully submitted,
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APPENDIX A

No. 9125—March 26, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

Department 2.

REEVES, *Respondent*, v. PACIFIC FAR EAST LINE, INC., *Appellant*.

Appeal from Circuit Court, Multnomah County.

RICHARD J. BURKE, Judge.

Argued and submitted February 6, 1969.

Eugene D. Cox, Portland, argued the cause for appellant. On the brief were Floyd A. Fredrickson and Gray, Fredrickson & Heath, Portland.

Ben T. Gray, Portland, argued the cause and filed a brief for respondent.

Before PERRY, Chief Justice, and MCALLISTER, GOODWIN, HOLMAN and HAMMOND, Justices.

REVERSED AND REMANDED.

HAMMOND, J. (Pro Tempore).

Plaintiff, a merchant seaman, brought this action against defendant for damages resulting from personal injuries sustained in September 1964 while serving aboard defendant's vessel the SS Canada Bear. From a judgment for plaintiff in the sum of $3,000 the defendant appeals, contending that the trial court erred in permitting the jury to consider a claim of temporary hearing impairment and in instructing the jury on the question of future pain and suffering and interference with plaintiff's normal and usual activities.

The injuries in question occurred while plaintiff was serving as a member of the deck crew at a time when the vessel was being secured for sea after loading cargo at San Francisco. The No. 1 hatch had been battened and booms for that hatch were being lowered into their cradles. A boom on the port side of the hatch swung wide dropping a guy block over the side of the ship. As plaintiff was helping to pull the block on board the ship a strain on a guy line caused it to become taut, jerking the wood and steel block so that it hit plaintiff on the left shoulder and side of his head, knocking him over the No. 1 hatch.

Plaintiff testified that he was knocked partially unconscious by the blow and that swelling resulted and that his face was "bruised black." He saw the purser who gave him some pills and the ship put to sea. He was asked about hearing problems and testified as follows:

> "A. Well, as far as I know, my hearing is—no problem with it right now, but there was for a while. That's true. And I had this operation, I guess they refer to it as minor, whatever it was. I don't have my hearing problems at this time.
>
> "Q. (By Mr. Gray) But at the time you say you were having problems, describe your own symptoms from your point of view.
>
> "A. I had a ringing, and it would ache, and I don't know. You might say uncomfortable all the time, lots of pressure on it, I guess."

Plaintiff further testified that a lump developed behind his left ear a month or two after the accident and that it was treated later by a doctor at Coos Bay who performed minor surgery upon it.

A doctor who examined plaintiff at the request of defendant's attorney was called as a witness for the plaintiff and testified that he examined plaintiff about three years after the accident. The doctor took a history from the plaintiff which he related as follows:

> "A * * * He told me that in late 1966 [sic] he was employed aboard the CANADA BEAR. He had been struck by a 75-pound guide block in the region of the left shoulder and the left side of his neck.
>
> "The patient had been knocked down and dazed as a result of this impact, and then noticed the onset of swelling on the left side of his neck and jaw. The ship was in the process of leaving San Francisco at the time of the injury, so medical attention was not available. The patient was able to continue standing his watches, which was his regular work, but was unable to do any overtime work because of the persistence of the swelling.
>
> "The patient consulted a physician a few months later, the exact date he didn't remember, and had a lump removed from behind the left ear and this was done in the doctor's office. Despite this treatment, he continued to have pain in the region of the left shoulder and he consulted a physician concerning this in Antofagosta, Chili, and also in Davao, Philippine Islands. And the latter doctor, the one in the Philippines, treated the patient with medications."

Regarding the lump behind plaintiff's ear that was treated by minor surgery the doctor testified:

> "A. * * * I felt that this cyst in the back, behind the left ear, was probably a sebaceous

cyst. There's no way of knowing this for certain except to obtain a pathological report from the physician that had excised this cyst. But the—by far the most common sort of cyst in the region would be a sebaceous cyst. These cysts occur not due to trauma but occur spontaenously.

"I can imagine that he could have had one that had been large enough to have partially occluded the external ear canal that would have made his hearing somewhat diminished during the time that the cyst was present, and I can see that would have improved with the removal. I didn't feel this had anything to do with the accident, however * * *."

Such evidence as was presented on the claim of hearing impairment could only lead the jury to speculate as to whether that problem had a causal connection with the accident or whether, instead, it had its origin in a sebaceous cyst that was unrelated to the accident. It was improper to permit the jury to conjecture upon this issue. *Howerton* v. *Pfaff*, 246 Or 341, 425 P2d 533 (1967).

Since this matter must be sent back for a new trial it is unnecessary to treat herein the second assignment of error, it being apparent that the problem will not again arise.

Reversed and remanded for a new trial.